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CORPORATION.
11

12 **BEFORE THE PUBLIC UTILITIES COMMISSION**
13 **OF THE STATE OF CALIFORNIA**
14

15 LA COLLINA DAL LAGO, L.P.;
and BERNAU DEVELOPMENT
16 CORPORATION,

17 Complainants,

18 Vs.

19 PACIFIC BELL TELEPHONE
COMPANY, dba AT&T California
20 (U1001C),

21 Defendant.
22

Case No. 09-08-021

COMPLAINANTS' REPLY
MEMORANDUM (RE: JUDICIAL
ESTOPPEL)

23 Complainants in this matter respectfully submit the following Reply Memorandum
24 (re: Judicial Estoppel) to the Honorable Myra J. Prestidge, Administrative Law Judge.

25 Complainants are La Collina Dal Lago, L.P and Bernau Development Corporation.

26 Defendant is Pacific Bell Telephone Company, dba AT&T California, U1001C
27 ("AT&T").

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COMPLAINANTS' REPLY MEMORANDUM ON JUDICIAL ESTOPPEL

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1 I. REPLY ARGUMENTS

2 **AT&T’S CHARACTERIZATION OF THE DEVELOPERS**
3 **WAS IMPLICITLY ADOPTED BY THE JENSEN COURT.**

4 In the Jensen Case, AT&T averred and formally represented to the Jensen Court that
5 (1) the developers do not act as purchaser-resellers when installing line extensions to
6 AT&T’s system; and (2) AT&T does not negotiate with developers over the terms and
7 conditions on which developers provide these extensions, but rather it requires them to install
8 the extensions according to its instructions.

9 AT&T’s lead attorney in the Jensen Case, who is also its lead attorney in the present
10 matter, formally *represented* these points to the Jensen Court.

11 AT&T’s witnesses, testifying under Rule 30 (b) (6), averred these points again and
12 again, specifically confirming that *there was no negotiation with developers of these*
13 *reimbursement prices*. They confirmed instead that *AT&T informed the developers of the*
14 *prices that it would pay to them for materials that the developers placed in developer-*
15 *provided line extensions*.

16 These assertions were *necessary* and *integral* to AT&T’s defense in the Jensen Case:
17 According to this version of events, there was no proper antitrust dispute before the Jensen
18 Court, but only an arguable regulatory dispute between AT&T and the developers who
19 provide line-extensions according to its instructions.

20 This argument succeeded.

21 The Jensen Court expressly agreed with AT&T that the alleged conduct in Jensen
22 raised regulatory issues, not antitrust issues, exactly as AT&T had argued throughout the
23 Jensen Case. Thus the *Jensen* court granted summary judgment on the following specific
24 grounds:

25 AT&T argues that even if AT&T has a regulatory obligation to
26 reimburse developers for their costs, and even if AT&T’s
27 agreement with Oldcastle somehow assisted AT&T in evading
that regulatory obligation, these facts do not amount to an
antitrust claim.

28 (...)

1 [On remand], the district court [in *Discon*] held that “regulatory
2 misconduct – even if it results in inappropriately high charges to
3 telephone customers – is not equivalent to a violation of the
4 Sherman Act. Both may harm consumers, but the appropriate
5 legal claims and remedies arise from different bodies of law.”
6 The district court further noted that “any such harm occurred in a
7 market – the telephone services (not removal services) market –
8 which is not even at issue in this case.”

9 (...)

10 The [*Jensen*] Court concludes that under *Discon*, Jensen’s antitrust
11 claims fail. The evidence is undisputed that Oldcastle did not charge
12 supra-competitive prices for vaults in the only markets alleged in
13 the complaint: the sale of telephone vaults to property developers
14 and contractors for the purpose of connecting properties to the
15 Wireline Network in both California and Nevada. *Instead, as in*
16 *Discon, the alleged injury occurs entirely as a result of a different*
17 *transaction involving alleged regulatory misconduct. While AT&T*
18 *may have violated a regulatory obligation to reasonably reimburse*
19 *developers and contractors for the cost of the vaults – a question*
20 *that the Court need not resolve – such a regulatory violation is not*
21 *tantamount to an antitrust violation.*

22 *Jensen Enterprises, Inc. v. Oldcastle Precast et al.*, Order Granting Summary Judgment of
23 February 23, 2009 (emphasis supplied).

24 AT&T’s characterization of the role of the developers clearly informed the Court’s view
25 of the case, and this characterization underlay the Jensen Court’s final decision, even if there
26 remained a (threadbare) dispute as to whether AT&T used the Oldcastle contract prices when
27 setting the reimbursement rates that it paid for one kind of material (AT&T Vaults).

28 Now AT&T wishes to avoid these same averments and representations by submitting a
declaration to this Court that the above characterizations were in fact premised on mistaken
assumptions.

This is unfair, and it should not be permitted.

**MOREOVER, ADOPTION OF THE CONTRARY
ASSERTION BY THE PRIOR COURT IS NOT REQUIRED
FOR A JUDICIAL ESTOPPEL.**

Judicial estoppel is an equitable doctrine used to prevent litigants from “playing fast and
loose with the courts” by averring one set of facts in one case and a contrary set of facts in a
second proceeding in order to further their new purposes of the moment.

//

1 The *Jackson* court, which the undersigned directed to this Court’s attention, requires a
2 five-prong showing. AT&T contends that Complainants cannot satisfy this five-part test because
3 they cannot satisfy one prong of this test – that the earlier court (the Jensen Court) adopted
4 AT&T’s prior contrary assertions.

5 Complainants respectfully disagree on two grounds.

6 First, the Jensen Court did indeed adopt AT&T’s characterization that the developers
7 were not purchaser-resellers of AT&T Vaults, and on the basis of this characterization it was
8 able to find that the developers harmlessly purchased AT&T Vaults from Oldcastle at
9 Oldcastle’s market prices, that afterwards AT&T and these developers had entirely separate
10 dealings that were governed by California regulatory law (Rule 15), that whether AT&T had
11 violated this regulatory law was not a matter for the Jensen Court.

12 In this manner the Jensen Court adopted AT&T’s prior contrary assertions (or implicitly
13 did so). The “prior adoption” requirement is therefore present in this case.

14 Second, such a showing is not always necessary. Some courts take the view that judicial
15 estoppel is rightly used to prevent litigants from making contrary assertions in different
16 proceedings, irrespective of whether the first court adopted the first set of assertions.

17 *Jackson* is the case that sets forth the five-part test. Yet even the *Jackson* court observed
18 that the “prior adoption” requirement might not always be necessary – i.e, judicial estoppel
19 might be appropriate *even where the estopped litigant’s earlier assertions were not adopted by*
20 *the court in the first proceeding.* See *Jackson, supra*, 60 Cal.App.4th at 183 (“we cannot rule
21 out the possibility that, in a future case, circumstances may warrant application of the doctrine
22 *even if the earlier position was not adopted by the tribunal.*”) (emphasis supplied). Accord:
23 *Drain v. Betz Laboratories, Inc.* (1999) 69 Cal.App.4th 950, 957 (quoting *Jackson* on this very
24 point).

25 Indeed, some California courts have already decided not to impose the “prior adoption”
26 requirement, but rather have judicially estopped contradictory averments *without requiring a*
27 *showing that the litigant’s earlier contrary averment was adopted in the earlier case.* See, e.g.,
28 *In re Marriage of Dekker* (1993) 17 Cal.App.4th 842, 850 (“Judicial estoppel is an equitable

1 doctrine aimed at preventing fraud on the courts. It is applied to keep litigants from playing ‘fast
2 and loose with the court.’”) (affirming the trial court’s application of judicial estoppel without
3 mention of any requirement of prior adoption by an earlier court);

4 More generally, the California courts have not universally adopted the “prior adoption”
5 requirement, and the California courts agree that in some cases the requirement might not be
6 appropriate. See Jackson, supra, 60 Cal.App.4th at 183. More generally still, the requirement
7 appears to have occasioned a split of opinion among the courts across the country. See Rissetto
8 v. Plumbers and Steamfitters Local (9th Cir., 1996) 343 94 F.3d 597, 601 (“The majority of
9 circuits recognizing the doctrine hold that it is inapplicable unless the inconsistent statement was
10 actually adopted by the court in the earlier litigation. The minority view, in contrast, holds that
11 the doctrine applies even if the litigant was unsuccessful in asserting the inconsistent position,
12 if by his change of position he is playing “fast and loose” with the court. In either case, the
13 purpose of the doctrine is to protect the integrity of the judicial process. This Circuit has not yet
14 had occasion to decide whether to follow the “majority” view or the “minority” view.”)
15 (quoting Yanez v. U.S. (9th Cir., 1993) 989 F.2d 323, 326).

16 In California, the courts have specifically held that the “prior adoption” requirement is
17 *not* required in appropriate cases, and that the decision to impose judicial estoppel is an equitable
18 one that rests with the trial court’s sound discretion: In Thomas v. Gordon, the court specifically
19 briefed the issue and then imposed judicial estoppel even though the litigant’s prior contrary
20 assertion had *not* been adopted by the earlier court. See Thomas v. Gordon (2000) 85
21 Cal.App.4th 113, 119 (“We believe that this is a situation which warrants application of the
22 doctrine of judicial estoppel even absent proof of success in the earlier litigation.”).

23 For the Thomas court, *it was sufficient that the litigant had attempted to make directly*
24 *contrary assertions of fact in two separate proceedings:*

25 Judicial estoppel is an equitable doctrine aimed at preventing fraud
26 on the courts. The essential function and justification of judicial
27 estoppel is to prevent the use of intentional self-contradiction as a
28 means of obtaining unfair advantage in a forum provided for suitors
seeking justice. The primary purpose of the doctrine is not to
protect the litigants, but to protect the integrity of the judiciary.
Accordingly, in Drain, we agreed with Jackson that because judicial
estoppel is an equitable doctrine, *the court could not rule out the*

1 *possibility that, in a future case, circumstances may warrant*
2 *application of the doctrine even if the earlier position was not*
3 *adopted by the tribunal.*

4 Other California courts have acknowledged that there is no hard and
5 fast rule which limits application of the doctrine to those situations
6 where the litigant was successful in asserting the contradictory
7 position. (...) Other courts [outside of California] have concluded
8 that judicial estoppel may be applied without regard to the party's
9 success in the earlier litigation. (...)

10 We believe that this is a situation which warrants application of the
11 doctrine of judicial estoppel even absent proof of success in the
12 earlier litigation

13 *Thomas, supra*, 85 Cal.App.4th at 118-119 (internal quotations and citations omitted) (emphasis
14 supplied).

15 There is a compelling policy reason for not imposing the “prior adoption” requirement.
16 *The requirement, if too rigorously applied, would likely encourage dishonest litigants to assert*
17 *irreconcilable positions whenever doing so furthered their purposes of the moment, so long as*
18 *they could say that the earlier contrary assertion was not actually adopted by the earlier court.*

19 This is precisely what AT&T has tried to argue in the present instance. *At a minimum,*
20 *this is not an appropriate standard for assessing the propriety of representations that a*
21 *regulated utility makes to this Court.*

22 Besides, Complainants can satisfy the “prior adoption” requirement in this case: The
23 Jensen Court implicitly adopted AT&T’s prior contrary assertions, so that the “prior adoption”
24 requirement is present in this case, even though it should not be a requirement for imposing
25 judicial estoppel.

26 AT&T should not now be permitted to reverse course in order to address the new
27 challenge asserted against it by the developers under Rule 15. AT&T made specific, clear
28 representations and averments in the Jensen Case in order to avoid antitrust liability. Essential
29 to its defense was its averment that the developers, when installing line extensions to its system,
30 do not act as independent purchaser-resellers and do not negotiate terms with AT&T, but rather
31 act in accordance with its instructions. Now it seeks to avoid regulatory liability by averring the
32 precise opposite on this specific point.

1 This Court should not permit AT&T to contradict itself in such a manner.

2 **AT&T HAS NOT ATTEMPTED TO REFUTE ITS SPECIFIC**
3 **30 (B) (6) TESTIMONY ON RULE 15 AND**
4 **REIMBURSEMENT POLICY.**

5 Despite much artful argument, AT&T has not *attempted* to contradict its testimony on
6 Rule 15 in the Jensen – testimony that was given AT&T’s Rule 30 (b) (6) witnesses.

7 Melissa Stanton’s Explanation of Rule 15. AT&T’s witness under Rule 30 (b) (6) on
8 Rule 15 was Melissa Stanton. In this capacity, she specifically testified to the following: *If*
9 *AT&T rather than the developer is obliged to bear the expense of a material under Rule 15, and*
10 *if it has the developer install such a material rather than install the material itself, it must*
11 *reimburse the developer for the cost of the material.*

12 Robert Nolasco’s Confirmation. This point was further confirmed by AT&T’s witness
13 under Rule 30 (b) (6) on developer-provided line extensions, Robert Nolasco (although he
14 testified only as to manholes, not all materials in general).

15 AT&T’s Testimony in Complainants’ Exhibit 4. The AT&T witnesses whose excerpts
16 were submitted as Exhibit 4 to Complainants’ opening submission all testified under Rule 30 (b)
17 (6) on AT&T’s procedures for reimbursing developers for developer-provided materials. One
18 after another, these witnesses said that AT&T sets its reimbursement rates according to its own
19 internal pricing policies and does *not* negotiate these prices with the developers (the typical
20 pricing formula is that AT&T reimburses the developer for a given material at the price at which
21 it could have directly purchased the material itself).

22 Rule 30 (b) (6) Testimony is Binding on AT&T. These witnesses testified under Rule 30
23 (b) (6), so that their testimony is deemed binding on AT&T. See Sanders v. Circle K Corp. (D.
24 Ariz., 1991) 137 F.R.D. 292, 294 (D. Ariz.,1991) (“The purpose behind Rule 30(b)(6) is to
25 create testimony that will bind the corporation.”).

26 AT&T should not be permitted to contradict this testimony in the present case.

27 **II. CONCLUSION**

28 This Court should grant the requested relief. AT&T should not now be permitted to make
either of the following two assertions: (1) that AT&T owes no obligation to reimburse

1 developers for developer-provided materials when Rule 15 requires AT&T to provide the
2 materials or pay for their cost; or (2) that AT&T conducts independent negotiations with
3 developers over the prices that it pays to the developers for materials used in developer-provided
4 line extensions.

5 Judicial estoppel should prevent any litigant from deliberately contradicting itself on such
6 fundamental points in two different proceedings. *It is all the more appropriate to enforce this*
7 *sanction against a regulated entity that wishes to contradict itself in such a manner to this Court.*

8 The request should be granted, or other appropriate relief should be given.

9
10 DATED: January 4, 2010

Respectfully re-submitted,
MALDONADO & MARKHAM, LLP

11
12 /s/
13 By: _____
14 William A. Markham,
15 Attorneys for Complainants,
16 LA COLLINA DAL LAGO, L.P. and
17 BERNAU DEVELOPMENT CORPORATION
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11

12 **BEFORE THE PUBLIC UTILITIES COMMISSION**
13 **OF THE STATE OF CALIFORNIA**

14
15 LA COLLINA DAL LAGO, L.P.; and) Case No. 09-08-021
BERNAU DEVELOPMENT)
16 CORPORATION,)
17 Complainants,) PROOF OF SERVICE
18 Vs.)
19 PACIFIC BELL TELEPHONE)
COMPANY, dba AT&T California)
20 (U1001C),)
21 Defendant.)
22 _____)

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PROOF OF SERVICE

I, the undersigned, hereby declare that I am over the age of eighteen years and not a party to the within action. My business address is 402 West Broadway, Suite 2050, San Diego, CA 92101.

On the date indicated below, I served the following document(s), which is (are) described as follows:

- **COMPLAINANT’S REPLY MEMORANDUM (RE: JUDICIAL ESTOPPEL)**

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/s/

Jennifer Ordorica



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